



Neutral Citation Number: [2020] EWHC 2396 (Fam)

Case No: FA-2020-000049

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/09/2020

Before :

**THE HONOURABLE MRS JUSTICE JUDD DBE**

Between :

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- and -  
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**Appellant**

**Respondent**

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**Mark Jarman** (instructed by **Randal Buckley of Richard Nelson LLP**) for the **Appellant**  
**Catherine Wood QC** (instructed on a Direct Access basis) for the **Respondent**

Hearing dates: 21<sup>st</sup> & 22<sup>nd</sup> May 2020  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:00am on 7 September 2020. A copy of the judgment in final form as handed down will be automatically sent to counsel shortly afterwards**

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THE HONOURABLE MRS JUSTICE JUDD DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

## **The Honourable Mrs Justice Judd :**

1. This is an appeal against an order of Mr. Recorder Evans, dated 18<sup>th</sup> February 2020, whereby he ordered that the two children who this case concerns, aged 8 and 7, should live with their mother and have indirect contact only with their father. He also ordered that the father be excluded from making decisions with respect to the children's education and health.

### **Background**

2. The parties met in 2008 and married in 2010. The children were born in 2011 and 2013. The family lived in the Far East and then in the United States of America before moving to the UK in the summer of 2018. The parents separated in 2017, following which they became involved in court proceedings in the US about the children when the mother applied to relocate to the UK. A Family Court Child Custody evaluation report by a psychologist recommended (and the US court ordered) a shared custody arrangement.
3. In May 2018 the court handed down judgment, permitting the relocation on specified terms, including that the children should spend extensive holiday periods with the father. No findings were made as to allegations by either parent of domestic abuse towards the other.
4. After the judgment, at a hearing on 19<sup>th</sup> June 2018, the father indicated that he intended to move to the UK as well, meaning that the US court had to reconsider the question of the father's contact arrangements. It ordered that the children should spend every other weekend with him, plus Wednesday to Friday in the intervening week. There is a dispute as to what the court intended for holiday arrangements (whether they should be for more than 50% of the holidays as ordered when it was thought the father would be remaining in the US, or whether they should revert to something less). The mother was to set up a bond of \$50,000 to be released to the father in the event of any breach of the order and both parents were to attend a co-parenting course before the relocation took place.
5. In July the mother and children, and then the father, came to live in England and in September the children started at their new school. The US court retained jurisdiction and a further judgment was handed down as to care arrangements, provision for child support, and for the children to have therapy in December 2018. A final order was made on 6<sup>th</sup> February 2019 in which jurisdiction was formally relinquished.
6. In the early part of 2019, one of the children required an operation. At the pre-admission appointment at the hospital an incident occurred whereby the mother alleged that the father had behaved in an overbearing and abusive manner, and that he had slammed a door into her when he was carrying the youngest child in his arms.
7. On 11<sup>th</sup> March 2019, the mother applied for a child arrangements order in the English court.

### **The English proceedings**

8. At the FHDRA, the mother applied for there to be a fact finding hearing. There has been a dispute as to what was concluded at that hearing, but I now have the benefit of a full transcript. The judge did express considerable scepticism as to whether a fact

finding hearing was necessary, in the face of the mother saying that she was content for the children to go on holiday with their father and also that, as her counsel then made clear ‘she isn’t saying that these children should not have a relationship with the father’. After some discussion in court and out, the mother withdrew her application for a fact finding hearing in what appear to me to be very clear terms. It is also clear from the transcript that the judge did not consider that the evidence from the hospital would be relevant to welfare ‘other than if they indicate that the children appear - or the children appear emotionally upset..... we will need to see it but it will play no bearing at all, because it relates to fact finding doesn’t it? So it is the emotional side?’ to which counsel responded ‘Exactly madam. I – I accept that’.

9. Underlying the judge’s indication at the FHDRA and the final outcome, including the mother’s concession, it seems to me, was the fact that the mother was not seeking to say that the father should not have contact with the children. The question was how much. Although there was an issue about interim contact at that hearing, it was about whether or not the father should have 70%, 50% or – as the judge ordered – 32% of the school holidays.
10. The first s7 report was produced by the Cafcass officer in the case, dated 15<sup>th</sup> September 2019. The officer saw both the children but did not see them with either parent. He interviewed both the parents separately and spoke to the school. His record of his interview with each of the children noted that they both said positive things about their mother. The older child also added that he wanted to see his dad more, and that he was ‘happy to go to dad’s’. The younger child said that his father made good food but that he shouted at them, telling them off, for example when he and his brother were fighting. He also said he felt bad when his father said bad things about his mum. When doing ‘feeling safe’ work he said he felt safe with his mother and not at his dad’s house.
11. The Cafcass officer came to the conclusion that the younger boy’s ‘resistance to spending time with his father is justified’. He said that he found his views to be based on his direct experience of his father and ‘are consistent with his previous disclosure that he had witnessed domestic abuse perpetrated by his father against his mother and also with comments he made to his GP this year’. The Cafcass officer went on to say that in relation to the older boy, he was concerned that he had not repeated what he had said when taken to the GP by the mother in 2018, namely that ‘his father is mean and shouts at him’ and therefore he believed that the father may have coached the boys to say they wanted to see him.
12. The Cafcass officer stated that he found the mother plausible and consistent in describing allegations of domestic abuse (including physical abuse, emotional abuse, intimidation and threats), and that her descriptions of the father were consistent with his own experience of his domineering and overbearing presentation. He said he had come to the opinion that domestic abuse (as distinguished from harmful conflict, which had been the view of the psychologist in the US) was likely to have occurred since the end of the relationship and that the mother was currently experiencing coercive and controlling behaviours. The Cafcass officer also noted that the father provided conflicting and confusing accounts of what he said was domestic abuse and alienation by the mother. He expressed concern about the father’s mental health and recommended an expert assessment. He concluded that the children and their mother

needed a break from direct arrangements whilst the father took responsibility for addressing his behaviour. He said he had considered recommending that direct contact be reduced but took the view that the father's response to that would intensify the difficulties for the children.

13. An expert assessment of the father was conducted by Dr. McLintock, Consultant Psychiatrist. I have not seen a copy of the report but it is accepted that he concluded that the father did not suffer from any mental illness, nor did he have a personality disorder. Beyond that, he would not go, save to say that issues about the father's behaviour should be determined by the court.
14. Following Dr. McLintock's report the Cafcass officer prepared an addendum report. He noted that 'I acknowledge that domestic abuse allegations are disputed, but in the event that clarity is provided either by admissions being made or via fact finding hearing, risks to [the children] would be reduced by their father's attendance on a Domestic Abuse Perpetrator's programme'.

#### The final hearing and the judgment

15. The hearing took place over three days in January 2020. Following on from the Cafcass officer's recommendation, the mother's case was that the father's direct contact with the children should cease, save by Skype. She also submitted that there should be a very significant restriction of the father's parental responsibility, in that the mother alone should be responsible for making decisions in respect of the children's health and education. This was a significant change from her position at the FHDRA. I do not say this by way of criticism, as she was taking her cue from Cafcass.
16. At the beginning of the hearing the mother applied for a social worker from the hospital to give evidence about the father's behaviour on the day of the appointment. The judge gave permission for her to attend.
17. The father was represented by direct access counsel. There was obviously some difficulty between them, which led to counsel withdrawing on the second day and the father then proceeded to represent himself.
18. At the end of the hearing the judge reserved judgment. In his judgment dated 18<sup>th</sup> February, he accepted the Cafcass officer's recommendations and decided that direct contact should cease for the time being, on the basis that it was not possible to provide a timescale for when it might be appropriate for the children to spend time with the father. The judge stated that the father required professional help/support in order for him to understand the negative effect that his behaviour towards the children and mother had upon them and to be able to effect change in his behaviour. The judge also restricted the father's parental responsibility.
19. Significantly, the judge also made a number of findings of fact. He determined that the father had been physically violent to the mother (accepting the evidence of the children, he said). The fact he was making such a finding is clear from paragraph 43 of the judgment. He heard evidence about and determined that the father had recklessly slammed the door at the hospital so that it struck the mother, and was

witnessed by the younger child, and that he had behaved in such a way at the hospital by denigrating the mother as to cause the younger child harm. He also found that the father refused to cooperate with educational and medical issues and caused the children harm as a result of that too. He found that the father's allegations against the mother were a 'diversionary tactic', that the father was untruthful, and that he had sought to influence what the children said to the Cafcass officer and was successful in the case of the older boy.

The appeal

20. Mr Jarman, on behalf of the father, mounts his appeal on a number of grounds. I will summarise the main ones as follows. First it is argued that the judge was wrong to make findings in circumstances where the parties had agreed that there would not be a fact finding hearing. Secondly, he relied on the Cafcass recommendation when that was based on the officer's own assessment of the facts. Third, the recorder applied insufficient weight to the extensive assessment that had been carried out in the US, which had led to several orders providing for – to all intents and purposes – joint parenting. The proceedings in the US formally ended only weeks before the mother's application to this court. Finally, the recorder was wrong to make the decision he did, terminating direct contact, without sufficient exploration of other types of contact, including supervised contact.
21. In argument, Mr. Jarman submitted that the judge, in relying on the recommendation of the Cafcass reporter failed to take into account the fact that the Cafcass officer had, effectively, carried out a fact finding exercise himself - basing his recommendation on his belief that the father had subjected the mother to domestic abuse and coercively controlling behaviours since their separation in 2017. He (the Cafcass officer) also stated that he was concerned that the father might have coached the children about what to say to him, amongst other things because he did not maintain the same feelings to him as he had done in his 'disclosures' to the GP five months before.
22. Mr. Jarman also argued that in circumstances where extensive direct contact had been in place for years, right up until the final hearing, the recorder's conclusion that direct contact with the father had caused the children harm and was likely to continue to do so was not borne out by objective evidence.
23. Miss Wood QC, on behalf of the mother submitted that the judge had heard and read evidence from both parents, the Cafcass officer and the social worker at the hospital. The evidence before him (including the way the father had behaved in court) clearly demonstrated how difficult the father's behaviour had been, subjecting the mother to repeated denigration and false allegations of breaking court orders and alienation. He refused to discuss any proposals she made about therapy for the children and replied to all her suggestions and communications about the children in an abusive manner. He behaved in a domineering and aggressive way at the hospital, causing the staff to be concerned and great distress to the younger child. The judge was eminently entitled to accept the recommendation of the Cafcass officer. As to his finding of facts, Miss Wood submits that the decision at the FHDRA was that there would be no fact finding as to historical events, but that did not cover the situation since the move to England. She also submitted that the judge had not in fact determined that the father had been physically violent to the mother in front of the children, only rejecting the father's allegation that the children had never said such a thing at all.

24. Discussion

25. Despite the eloquent written and oral submissions of Miss Wood for the mother, and the great deference that should always be given to a judge at first instance who had the opportunity to see and hear the witnesses give evidence (and in the case of the father, ask questions and make submissions), I have come to the conclusion that this appeal should be allowed for the following reasons.
26. First, the recommendation made by the Cafcass officer and accepted by the judge that there should be no direct contact was based upon the officer's clear view that the father had engaged in coercively controlling and abusive behaviour. This was not limited to what had happened in the UK but related also to what had happened in the US. At the FHDRA it was ordered that there should be no fact finding hearing and this decision was not revisited at the DRA.
27. Hindsight is a wonderful thing, and it is easy to see that at the DRA the focus of both parties and the court was on the proposal that the father should have a psychiatric assessment rather than upon defining the issues that required to be decided at the final hearing. The case was now being put on a very different basis to the situation at the FHDRA.
28. The effect of there being a Cafcass recommendation based upon findings that were not formally being sought put the father at a disadvantage. The recorder was also put in a difficult position. Only three witnesses were expected to give evidence, the father, the mother, and the Cafcass officer. I do not think the recorder's decision to accede to the application by the mother to call the social worker at the hospital was pivotal, for at least the father was able to challenge what she said, but the reliance on other witnesses, for example the GP, who did not file a statement, was not asked any explanatory questions, and did not come to court, is problematic. The recorder relied upon allegations against the father that had been made in the US court proceedings, and what the GP recorded in two brief letters, to make a finding that the father had been physically violent to the mother in front of the children. It was not clear from the short reports precisely what the children had said to the GP, or indeed what questions they were asked. The recorder accepted the Cafcass officer's opinion, based on his view that the father was coercively controlling of the children as well as the mother, that the oldest child was doing his father's bidding when he said he was happy to go to dad's, and his view that the children were suffering harm as a result.
29. Secondly, the Cafcass officer advised, and the recorder found that the children were suffering harm. This finding was very much dependent upon the findings that the father was coercively controlling and abusive, as the children appeared to be functioning pretty well on a day to day basis. The feedback from the school was very positive – the children were happy and popular, and making progress with their schoolwork. This was all at a time when they were staying with their father every other weekend and for two midweek nights a fortnight. It is difficult to find (apart from some quite general references in the mother's evidence) what the evidence was that the children were exhibiting signs they were currently being harmed as a consequence of their contact with the father, at least to the extent that justified ending it. When the Cafcass officer asked the younger child for details about a comment he

made about the father shouting at them the child said that this was usually when he was fighting with his brother.

30. Despite making such a significant recommendation the Cafcass officer did not observe the children with their father, to get some direct evidence of the relationship they had. The most detailed assessment of the father's relationship with the children had been in the US proceedings (all the documents relating to this were disclosed into these proceedings). These were somewhat dated by February 2020, but the observations of the father with the children by the US court appointed psychologist had demonstrated that the father was very much able to show emotional warmth and very good care of the children, although the difficulties in his personality were observed there too. Undoubtedly those strong positive features of the fathers relationship with the children formed an important aspect of the court's decision there to order extensive contact. The recorder was right to note that he was not bound by the US court decision, but given the magnitude of the decision he was making, the recent, very different conclusion it had reached and the evidence underpinning it should have been given more weight.
31. Thirdly, in his judgment the recorder did not appear to weigh in the balance the harm that could be caused to the children by the immediate loss of their relationship with the father, which had to be set against the risks to the children and the mother of contact continuing. The fact that there was to be Skype contact for 10 minutes twice a week does not seem to me to be sufficient mitigation of the loss of frequent staying contact, nor was the aspiration that the cessation of contact would not be permanent. I also accept Mr Jarman's submission that greater consideration should have been given as to testing out whether some other arrangement for direct contact, short of it ceasing altogether, could work, even on an interim basis.
32. Given the complexities of the case, it is clear to me that it will have to be remitted for a rehearing. Mr Jarman urges me to simply reinstate the previous order for direct, staying and holiday contact. I decline to do so for there are difficult issues that need to be determined, and in allowing this appeal I am in no position to suggest the final outcome (including a decision about the exercise of parental responsibility), which will have to be considered by another judge on all the available evidence. The case will have to be listed for another FHDRA, where questions such as separate representation for the children, the ambit of any fact finding hearing, and whether there should be a psychological assessment of the father (as opposed to a psychiatric assessment which had quite a narrow focus) will be considered.
33. As I have said above, the recorder found himself in an extremely difficult position in this case. He was not responsible for the case management decisions, nor did he have a transcript of the FHDRA to consult, as I have. The Cafcass officer based his conclusions upon clear views about the underlying facts. For most of the hearing the father was unrepresented, and so the points which have been so well argued before me were not brought to the recorder's attention.
34. For all the reasons I have set out, the appeal is therefore allowed.